In the Supreme Court of the United States

OCTOBER TERM, 1924

SAM SILBERSCHEIN, PLAINTIFF IN ERROR
v. } No. 66
THE UNITED STATES

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES

STATEMENT

This is a suit to recover compensation to which plaintiff in error claims to be entitled under the so-called amendatory War Risk Insurance Act of August 9, 1921, Section 18, 42 Stat. 147 (R. p. 3), and Section 11 of the Act of December 24, 1919, 41 Stat. 371. A motion to dismiss was sustained. (R. p. 16.) The question of the jurisdiction of the court below has been certified to this court. (R. p. 22.)

ARGUMENT

The War Risk Insurance Act, including its several amendments, negatives any right to maintain a suit against the United States for the recovery of compensation granted by that Act.

The amendatory Act of October 6, 1917, Section 408, Chap. 105, 40 Stat. 398, 410, reads in part as follows:

> That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides.

The Act in which the above provision appears provides also in great detail for both disability compensation and insurance payments, so that the restriction in the same Act to "a claim under the contract of insurance", of the right to sue the United States in the District Court, can not reasonably be construed otherwise than as a legislative intent to withhold the right of suit for mere disability compensation. That the omission can not be construed as a legislative inadvertence seems to be definitely established by the further amendment of May 16, 1918, chap. 79, 40 Stat. 554, 555, which repealed the aforesaid Section 405 of the Act of 1917, and amended Section 13 of that Act to read as follows, so far as here pertinent:

> *Provided, however,* That payment to any attorney or agent for such assistance as may be

required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: *And provided further*, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

Here again the right of suit is not only restricted to claims under insurance contracts, but the *limitation* upon attorneys' services also cogently discloses a deliberate purpose to deny the right of suit on claims like the one here involved.

It was natural that Congress should withhold the right of suit in mere compensation cases for in Sections 13 of the Acts of 1917 and 1918, supra, it specifically constituted the Director the sole tribunal to "decide all questions arising under the Act" except where suit was affirmatively authorized. *Forbes* v. *Welch*, 286 Fed. 765. Moreover compensation for disability never became a fixed and enduring allowance. Its changeability was thus provided for in Section 305 of the Act of 1917, supra, which reads as follows:

> That upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation.

It could therefore well happen that while any suit such as that at bar was in course of adjudication a valid change might be made in the compensation in dispute which would make it impossible for the court to render a collectible judgment. The award of compensation is subject to this contingency until actually paid.

It is axiomatic that the right to sue the United States must be clearly conferred. *Schillinger* v. *United States*, 155 U. S. 163. In the case at bar the right of suit seems to have been deliberately withheld. As further bearing on the rule to be applied here see *United States* v. *Pfitsch*, 256 U. S. 547, 552 et seq.

II

The so-called Tucker Act does not authorize suit for the compensation here involved

Assuming, arguendo, that the War Risk Insurance Act and its various amendments were not intended to deny right of recovery against the United States in a suit for disability compensation, it only remains to consider whether the provisions of the so-called Tucker Act, now embraced in Paragraph 20 of Section 24 of the Judicial Code, are broad enough to include the suit at bar. The said statute reads as follows:

> Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims,

> claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine * * * claims for pensions * * *.

The first serious objection to the maintenance of the suit under the above statute is found in the fact that the claim for compensation is not such a claim on account of which a "party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable."

The compensation here involved is a mere gratuity, bounty, or benefit which Congress could have originally withheld, or may now modify or repeal. That it is not bestowed as an inducement to service in the military branch is disclosed by the fact that the beneficiaries thereof are not limited to those entering the service after its passage, but extend as well to persons already in the service. Section 22 of the War Risk Insurance Amendment of October 6, 1917, 40 Stat. 398, 401, contains the following definitions:

> In Articles II, III, and IV of this Act, unless the context otherwise requires—
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> * * * * * *
>
> (7) The terms "man" and "enlisted man" mean a person, whether male or female, and whether enlisted, enrolled, or drafted into

> active service in the military or naval forces of the United States, and include noncommissioned and petty officers, and members of training camps authorized by law.
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> (8) The term "enlistment" includes voluntary enlistment, draft, and enrollment in active service in the military or naval forces of the United States.

Notice that the benefits of the Act are conferred not only upon enlisted men, but also upon those who have been drafted for service. They all share equally. It could scarcely be contended that a person compelled by draft to serve in the Army gave his service in consideration of the benefits prescribed by the law here under review, and therefore obtained a vested right in such benefits. He is grouped with the voluntarily enlisted men, and it would be hard for the latter to spell out a greater right under the statute. The legislative intention must, of course, control, and the whole scheme of the several amendatory War Risk Acts forbids construing them as pay instead of gift statutes.

Moreover, disability compensation partakes of all the elements of a pension as defined by this court in *United States* v. *Hall*, 98 U. S. 343, 350, as follows:

> Regular allowances paid to an individual by government in consideration of services rendered, or in recognition of merit, civil or military, are called pensions.

See also *Frisbie* v. *United States*, 157 U. S. 160, 166.

As the compensation provided by the War Risk Insurance Acts is not distinguishable on principle from allowances granted in prior pension statutes, it can not be treated otherwise than as a pension, and for that reason specifically withheld from the provisions of the so-called Tucker Act, supra.

This is rendered more certain in case of plaintiff in error, for the statute increasing the monthly allowance from $30 to $80 for total disability, which latter sum is now claimed by him as a vested right, was not enacted until December 9, 1919, 41 Stat. 370, 373, nearly two years after he was discharged from the military service on account of physical disability. (R. p. 1.) Under these circumstances his assertion of a contractual or legal right is futile.

III

So-called Tucker Act not applicable for additional reason case at bar involves disputed facts

Should this court conclude that claims for compensation fall within the description of claims on which suits are authorized by the so-called Tucker Act, supra, then it is suggested that no suit will lie in the case at bar for the reason, as pointed out by the court below, it involves disputed questions of fact. The lower court's opinion (R. p. 16) upon the point seems to need no elaboration.

IV

It is respectfully submitted that the judgment below should be affirmed.

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